thirty (30) days of receipt of an invoice. Except as otherwise specifically provided in this Agreement, interest on overdue invoices will apply at the six (6) month Commercial Paper Rate applicable on the first business day of each calendar year.

10.0 Reconsideration after Pending xDSL Arbitration

10.1 The Parties acknowledge and agree that the terms and conditions set forth in this Attachment shall be subject to the outcome of the xDSL Arbitration, subject to any associated judicial review; provided, however, until such time as a final Order is issued by the Commission in the xDSL Arbitration, the rates, terms and conditions set forth in this Attachment shall apply. Following the issuance of a final Order by the Commission in the xDSL Arbitration, the Parties shall meet within thirty days and expend diligent efforts to arrive at an agreement on conforming modifications to this Attachment, based on the final outcome of the xDSL Arbitration and the Memorandum of Understanding filed by SWBT on April 26, 1999, in Project No. 16251, *Investigation of Southwestern Bell Telephone Company's Entry Into the Texas InterLATA Telecommunications Market*. If negotiations fail, disputes between the Parties concerning the interpretation of the actions required or the provisions affected in this Attachment shall be handled under the Dispute Resolution procedures set forth in this Agreement. Except as otherwise provided, the results of the xDSL Arbitration shall be effective prospectively from the date the Commission's Order becomes final, unless the Order is stayed pending appeal.

10.2 Following the issuance of a final Order in the xDSL Arbitration, a CLEC party to this Attachment will have the option of either continuing to operate under this Attachment as modified according to Section 10.1, or electing to MFN into the xDSL rates, terms, and conditions that result from the xDSL Arbitration.

10.3 Performance measurements for xDSL will be finalized within thirty (30) days after the final Order in the xDSL Arbitration.

Appendix A

xDSL Technologies Presumed Acceptable for Deployment

The technologies listed in this Appendix are presumed acceptable for deployment. This list should be expanded as additional services are deployed, or national standards developed.

The following technologies currently have a national standard in place:

Technology	Standard
ADSL & RADSL	T1E1 LB715 (T1E1.4/99-161)/ANSI T1.413 – 1998 (Issue 2) FDM/ITU 992.1
SDSL 784 kb/s & 1.5 Mb/s	ANSI TR.28/ ITU 991.1
IDSL	ANSI T1.601
HDSL	ANSI TR28/ITU 991.1

The following technologies have been successfully deployed with no apparent degradation of the performance of other services:

SDSL 160 kb/s - 784 kb/s

SDSL 1.0, 1.1 Mb/s

ATTACHMENT 4

Yackle, Cliff

From: QUICK, MARI S (SBC) [MQ0298@txmail.sbc.com]
Sent: Thursday, January 14, 1999 1:45 PM
To: BEVERLY REID; KING, RICHARD L (SBC); THURWALKER, JAMES A (SBC); MAH, LARRY K (SWBT); A EDWARD FRISA; AARON S VINYARD JR; ALAN C THIEBAUD; ANDREW P (ANDY) WALKER; ANNA SALGUERO; BILL SLOCOMB; BRUCE R NESBIT JR; CHAD KEITH; Cherylann Mears; CHRISTY S ELLIOTT; CLIFFORD YACKLE; Dan Jacobsen; Dave Kong; DAVE R KOENIG; DEBRA A DIETZ; DON ANTHONY FULTON; DONALD K PAVLACIC; ELIZABETH (BETH) RICE; Eric Boyer; EUGENE G FEDELIN; FREDERICK M DOERING; GARVIN H SHIPLEY JR; GEORGE R PHILLIPS JR; GERALD O (JERRY) ELLIS; GREG LYON; GREGORY A WEBER; IDA MILLS; Isabelle Salgado; JAMES R (JIM) BROOKS; JAMES M BOUFFARD; JAMES R GOODSON; JAN L BROWN; JAN SUNDAY; JEFFREY GAY; Jerry Fuess; JILL E MORLOCK; JIM PAUL; JOHN R MONROE; KEVIN CHAPMAN; KIM HARVEY; LARRY D MERRITT; LARRY WREN; LEE A CULVER; LEO F ROHDE; Lincoln Brown; LINDA A MARTIN; LINDA R MORGAN; LYNN LEHEW; MARI S QUICK; MARIA E MALHAM; MARK P ROYER; MARK RUSSELL; MAUREEN LACONTE; MELVIN A SMITH; Merrie Cavanaugh; PEGGY BLANNER; PHILIP BOWIE; RICHARD T JORDAN; RICK MANTOOTH; RONALD C OWENS; SALVADOR M CUELLAR JR; SANDRA H TUHOLSKE; STEVE WEINERT; STEVEN F NAIL; STEVEN L BARTSCH; STEVEN P FORMHALS; Terry Peters; TERRY STECKLINE; THOMAS E ZURHEIDE; THOMAS MAXWELL; TONI R GOSA; VICTORIA BIRD; William Hurst; WILLIAM R DREXEL; Wing Eng; WINSTON H SMITH; YOLANDA (YOLI) BARRERA
Subject: URGENT - ATTY CLIENT COMM'N

Importance: High

IMPORTANT INFORMATION FROM:
Merrie M. Cavanaugh
Senior Counsel
SBC Communications Inc.
175 E. Houston Room 4-E-10
San Antonio, TX 78205
210-351-3420 Tel.
210-351-3868 Fax

RE: MIDWEST RETAIL ADSL

"This is an attorney/client privileged communication. Ensure that all documents, including "Word", e-mail, and attachments, that do not represent SBC's current retail plans are destroyed and/or deleted from the hard drive of your computer immediately."

MARI QUICK
CORP. MGR.
PROD. DEVELOPMENT
210-886-3119

CONFIDENTIAL

ACIC011759

ACI-153

DOCKET NO. 20226

PETITION OF ACCELERATED CONNECTIONS, INC., d/b/a ACI CORP. FOR ARBITRATION TO ESTABLISH AN INTERCONNECTION AGREEMENT WITH SOUTHWESTERN BELL TELEPHONE COMPANY	§ § § § § §	PUBLIC UTILITY COMMISSION OF TEXAS

DOCKET NO. 20272

PETITION OF DIECA COMMUNICATIONS, INC., d/b/a COVAD COMMUNICATIONS COMPANY FOR ARBITRATION OF INTERCONNECTION RATES, TERMS, CONDITIONS AND RELATED ARRANGEMENTS WITH SOUTHWESTERN BELL TELEPHONE COMPANY	§ § § § § § §	PUBLIC UTILITY COMMISSION OF TEXAS

ORDER NO. 20

ORDER RULING ON ACI's AND COVAD's MOTIONS AND AMENDED MOTIONS ON SANCTIONS, ACI's AND COVAD's MOTIONS TO DECLASSIFY ACI EXHIBIT 153, SWBT's MOTION TO RECONSIDER AND REVERSE BENCH RULING, AND SWBT's LIMITED AND CONDITIONAL OFFER OF PROOF RELATING TO ACI EXHIBIT 153

TABLE OF CONTENTS

I. INTRODUCTION

A. SUMMARY OF FINDINGS

This Order addresses four interrelated motions pending before the Arbitrators in these joint proceedings. Each of the motions concern underlying interdependent issues that must be resolved before the Arbitrators can make their final finding on the motions for sanctions. This Order begins with an introduction and background information on the issues, addresses each of the four major pending motions, and discusses the sanctions award.

The sanctions proceeding in these dockets arises from an arbitration proceeding involving Accelerated Communications, Inc. (ACI), DIECA Communications, Inc. d/b/a Covad Communications Company, (Covad) (collectively referred to as Petitioners), and Southwestern Bell Telephone Co. (SWBT).[1] In their Motions for Sanctions, Petitioners allege that sanctions

[1] *Petition of Accelerated Connections, Inc., d/b/a ACI Corp. for Arbitration to Establish an Interconnection Agreement with Southwestern Bell Telephone Company,* Docket No. 20226 (December 11, 1998) and *Petition of DIECA Communications, Inc., d/b/a Communications Company for Arbitration of Interconnection Rates, Terms, Conditions and Related Arrangements with Southwestern Bell Telephone Company,* Docket No. 20272 (December 21, 1998). Order No. 2 in both dockets, filed January 19, 1999, consolidated the proceedings for procedural purposes only.

should be imposed against SWBT for: (1) failure to properly respond to discovery requests; (2) failure to properly designate knowledgeable witnesses; (3) improper designation of certain documents as "confidential information;" (4) intentional alteration of documents so as to make them misleading; and (5) issuance of a specific directive in ACI Exhibit 153 in circumvention of discovery.[2]

In summary, the findings of the Arbitrators are as follows:

- The Arbitrators grant Petitioners' Motions to Declassify ACI Exhibit 153 as discussed in Section II. A. of this Order. The Arbitrators find no basis for confidential designation of ACI Exhibit 153 under the terms of the Protective Order in these proceedings or applicable law. However, the Arbitrators also stay the ruling on declassification pending a ruling on appeal by the Commissioners on this Order.
- The Arbitrators overrule SWBT's Motion to Reconsider.[3] The Arbitrators find no new argument or grounds justifying reversal of the Arbitrators' decision to admit ACI Exhibit 153 into evidence. The bench ruling stands, for all of the reasons stated by the Arbitrators during the June 3, 1999, hearing on sanctions, and for the reasons discussed below at Section II. B. of this Order.
- The Arbitrators also deny, in Section II. C. of this Order, SWBT's request to use a specific document claimed as privileged in a manner which constitutes an offensive use of a privilege that does not afford Petitioners or the Arbitrators an opportunity to review a complete record.[4]

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[2] For the purpose of clarity in this order, the Arbitrators have included ACI Exhibit 153 as confidential Attachment B, and will refer throughout this Order to confidential statements as shown in specific paragraph numbers in confidential Attachment C. That system of reference should allow this Order to remain nonconfidential, but will refer to items that have been designated as confidential.

[3] SWBT Motion to Reconsider and Reverse Bench Ruling as to Status of Attachment 4 of ACI's Amended Motion for Sanctions (June 16, 1999). Attachment 4 to ACI's Amended Motion for Sanctions is more appropriately referred to as ACI Exhibit 153, and the Arbitrators will use that designation throughout this Order.

[4] *See* TEX. R. CIV. EVID. 107 (Rule of Optional Completeness). Further, TEX. R. CIV. EVID. 106, Remainder of or Related Writings or Recorded Statements, does not create an exception to the prohibition against using privileged documents without supplementing discovery, as set out in TEX. R. CIV. PROC. 193.4(c).

- The Arbitrators grant Petitioners' motions for sanctions[5] in part and deny them in part. The Arbitrators find that SWBT's failure to produce requested documents and the directive contained in ACI Exhibit 153 (Attachment B) constitute an abuse of discovery. The Arbitrators also find that SWBT's failure to provide witnesses who were knowledgeable about their company's activities on which they were providing testimony was an abuse of discovery. Although the Arbitrators do not rule in this Order on the Motions to Declassify[6] which allege that SWBT misdesignated certain documents as "confidential information" in violation of the Protective Order, the Arbitrators do find that the declassification of misdesignated documents is a more appropriate remedy than the imposition of sanctions.
- The Arbitrators deny Petitioners' motions related to SWBT's alteration of ACI Exhibit 17a. While it is clear that the document was not properly redacted, there is no evidence that there was intent or malice on the part of SWBT in doing so.
- The Arbitrators conclude the appropriate form of sanctions is to require SWBT to pay all of Petitioners' costs, expenses, and attorneys' fees directly resulting from the additional discovery, depositions, additional preparation for and attendance at the portion of the hearing on the merits and the sanctions hearing which occurred after ACI Exhibit 17 was produced on April 15, 1999. These amounts will be determined in Phase II. of the sanctions proceeding as discussed in Section III. of this Order.

B. Procedural History

In December 1998, Petitioners requested the Commission to conduct arbitration proceedings to resolve issues concerning xDSL service provisioning pursuant to interconnection agreements with SWBT. Discovery commenced on January 6, 1999. On the day after the

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[5] Accelerated Connections, Inc.'s Motion for Sanctions Against Southwestern Bell Telephone Co. (April 20, 1999); Communication Co.'s Motion for Sanctions Against Southwestern Bell Telephone Co. for Discovery Abuses (April 23, 1999); Accelerated Connections, Inc.'s Amended Motion for Sanctions Against Southwestern Bell Telephone Co. (June 1, 1999); Communications Company's Motion Joining ACI Corp.'s Amended Motion for Sanctions Against Southwestern Bell Telephone Company (June 2, 1999).

[6] The Arbitrators rule on ACI's and 's specific motions to declassify ACI Exhibit 153 as discussed in Section II. A. of this Order. ACI's and 's motions to declassify other documents will be addressed in a subsequent order.

hearing on the merits convened on April 14, 1999, it was discovered that SWBT had not produced certain documents in discovery.[7] On April 15, 1999, SWBT produced a redacted document labeled "Southwestern Bell DSL Methods and Procedures," which appeared to be responsive to numerous requests for information timely served on SWBT by ACI and Covad during the discovery period prior to the convening of the hearing on the merits.[8] This document was subsequently marked and admitted as ACI Exhibit 17. The Arbitrators immediately ordered SWBT to produce previous versions of "Southwestern Bell DSL Methods and Procedures" (M&Ps), a key manual on xDSL methods and procedures.[9]

On April 16, 1999, SWBT provided an unredacted version of ACI Exhibit 17 that was designated as confidential; this exhibit was admitted into evidence under seal as ACI Exhibit 17a. On April 20, 1999, and April 23, 1999, ACI and Covad, respectively, filed motions for sanctions against SWBT for discovery abuse, based on the belated discovery of ACI Exhibits 17 and 17a. Because of the belated production of highly relevant documents[10] and the consequent concern that SWBT had not been fully responsive to discovery requests, the Arbitrators ordered that discovery be extended for a period of six weeks to allow Petitioners an opportunity to conduct additional discovery. A hearing on the motions for sanctions convened on June 2, 1999,

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[7] During the hearing on the merits, in response to a Commission staff question, SWBT witness Allan Samson testified that SWBT had created internal documents. Tr. at 324-325 (April 14, 1999). Counsel for SWBT, Mr. Leahy, conceded that the documents would have been responsive to various Requests for Information (RFIs) filed by the Petitioners. Tr. at 620-621 (April 15, 1999).

[8] For example, the xDSL M&P document, subsequently admitted as ACI Exhibit 17, was responsive to at least the following Requests for Information (RFIs) served by ACI and on SWBT: ACI's Second Request for Information (RFI), Numbers 1, 2, 3, 15, 19, 20, 25, 31, 33, 36, 38, 39, 40, 53, 69, and 71; ACI's Third RFI, Nos. 6, 7, 15, 16, 28; ACI's Sixth RFI Nos. 1, 2, 3; ACI's Eighth RFI, No. 3; 's First RFI, Nos. 11, 12, 14, 15, 16, and 28; 's Second (RFI), Nos. 42, 49, 50, 51, 53, 54, 55, and 58. The above RFIs were propounded prior to April 14, 1999.

[9] Tr. at 642 (April 15, 1999) states: "We want Southwestern Bell to produce the 10/5/98 version of this document, as well as any other versions and supporting documentation that you can provide to us that would support or be relevant to or would provide source documentation for this xDSL methods and procedures document that you provided. That's by nine o' clock in the morning. We would also like for you to provide a list of those that have been directly involved with this project, not to make them available but just provide a list of those who have been involved in this project, and I would also like an answer to the question to what – or for what purpose has this document been used. In other words, has it been used in any offices for the conduct of any business, and I want you to interpret that as broadly as possible."

[10] The same day (April 16, 1999) that SWBT produced ACI Exhibit 17a, SWBT also produced approximately two dozen additional relevant documents retrieved from employees pursuant to the Arbitrators' directive.

and continued until June 6, 1999. The sanctions hearing was reconvened and concluded on June 23, 1999.[11]

ACI filed an amended motion for sanctions, which Covad joined on June 2, 1999. ACI's amended motion asserted that SWBT intentionally committed a sanctionable act[12] and therefore additional support for sanctions exists. In support of its claim, ACI attached a copy of what appeared to be an e-mail message from an attorney for SBC Communications, Inc. (SBC) to another SBC employee, which had been created during SWBT's initial period of discovery, and had been produced by SWBT during the period of additional discovery.[13] After hearing extensive argument, closely reviewing the argument made in ACI's Amended Motion for Sanctions, and reviewing the briefs and support filed by the parties, the Arbitrators determined that the e-mail message was not privileged and it was admitted into evidence under confidential seal as ACI Exhibit 153.[14] SWBT immediately made an oral motion for reconsideration. The Arbitrators denied this motion on the three grounds discussed in Section II. B. of this Order. On June 16, 1999, SWBT filed its written Motion for Reconsider of the Arbitrators' bench ruling admitting the e-mail message into the record.

On June 2, 1999, the Arbitrators called six witnesses[15] to testify on matters contained in ACI Exhibit 153.[16] After placing the witnesses under "the rule,"[17] Commission staff questioned each witness, Petitioners were given an opportunity to cross-examine them, and SWBT was allowed to engage in redirect examination of those witnesses.

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[11] The hearing on the sanctions was convened prior to the continuation of the hearing of the merits and was recessed and reconvened from time to time concurrently with the hearing on the merits.

[12] *See* Confidential Attachment C, Paragraph 1.

[13] Southwestern Bell Telephone Co. (SWBT) is a subsidiary of SBC Communications, Inc.

[14] Tr. at 948-957 (June 3, 1999).

[15] The six SWBT witnesses called were Sharon Collier, Jerry Gordon, William Deere, Bruce Nesbit, Mari Quick, and Merrie Cavanaugh. Ms. Cavanaugh, although placed under the rule, was ultimately not called to testify.

[16] Tr. at 166-167 (June 2, 1999).

[17] TEX. R. CIV. PROC. 267 provides for witnesses on both sides in a civil proceeding to be sworn and removed out of the courtroom to some place where they cannot hear the testimony as delivered by any other witness. The witnesses in this proceeding were also instructed not to discuss the case with each other or with any other person in the case other than the attorneys in the case, except by permission of the court. This is termed placing the witnesses under the rule. *See also* TEX. R. CIV. EVID. 614, *Exclusion of Witnesses*.

Prior to questioning of these witnesses, SWBT requested that it be allowed to use a document, asserted to be confidential under the attorney-client privilege, to explain ACI Exhibit 153. At the same time, however, SWBT wanted the Arbitrators to find, in advance, that disclosure of the document to the Arbitrators would not constitute a waiver of any privilege asserted for the document, or of any other communications on the same subject matter.[18] The Arbitrators refused to grant this request, and asked the parties to file briefs on the issue. The briefs were filed prior to reconvening the hearing on sanctions on June 23, 1999.[19] After taking oral argument on this issue in the reconvened hearing on sanctions, the Arbitrators ruled that SWBT could not use an allegedly privileged document to prove or disprove facts contained in ACI Exhibit 153 and then maintain that the document, along with all other evidence necessary to make ACI Exhibit 153 fully understood or to explain the same, are privileged and not subject to discovery by ACI and Covad or the Arbitrators.[20] As a result, SWBT did not use the document in question during the sanctions hearing.

C. JURISDICTION AND GOVERNING RULES

The underlying § 251 interconnection arbitration proceeding is conducted pursuant to the authority granted to the Commission by the federal Telecommunications Act.[21] P.U.C. PROC. R. 22.305(j) states that the Texas Rules of Civil Procedure do not apply as a matter of law in FTA arbitration proceedings, unless specifically referenced in Subchapter P.[22] Order No. 1 in this

[18] Tr. at 885-888 (June 3, 1999); this matter is fully addressed below at section II. C.

[19] SWBT's Response to Briefing Requested by Arbitrators on Waiver of Attorney Client Privilege (June 16, 1999), ACI's Brief on Attorney Client Privilege (June 16, 1999), Covad's Brief on Attorney Client Privilege (June 16, 1999).

[20] Tr. at 949-950 (June 3, 1999). *See* TEX. R. CIV. EVID. 107.

[21] Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (codified as amended in scattered sections of 15 and 47 U.S.C.) (FTA).

[22] P.U.C. PROC. R. 22.305(j) states "The rules of privilege and exemption recognized by Texas law shall apply to arbitration proceedings under this subchapter. The Texas Rules of Civil Procedure, Texas Rules of Civil Evidence, and Subchapters A-O of this chapter are not applicable to proceedings under this subchapter, unless specifically referenced in this subchapter."

proceeding incorporates this rule by stating that the Texas rules will not apply unless specifically referenced.[23]

P.U.C. PROC. R. 22.305(k) (Subchapter P) specifically grants the Arbitrators broad discretion in conducting proceedings consistent with the powers given the presiding officer under P.U.C. PROC. R. 22.202(c). This rule generally grants the presiding officer broad discretion in conducting the course, conduct and scope of a hearing. The Arbitrators conclude that P.U.C. PROC. R. 22.202(c) *allows* the Arbitrators to conduct this proceeding in accordance with the Texas Rules of Civil Procedure, together with the Commission's procedural rules on discovery and sanctions.[24]

Specifically, TEX. R. CIV. PROC. 215(3) authorizes an adjudicative body to impose sanctions for discovery abuse.[25] P.U.C. PROC. R. 22.161 also provides for sanctions in contested cases and closely tracks TEX. R. CIV. PROC. 215. Under the Arbitrators' broad authority granted by P.U.C. PROC. R. 22.305(k), where there is conflict between the two rules, the Arbitrators use TEX. R. CIV. PROC. 215 in addition to, or in lieu of, P.U.C. PROC. R. 22.161. It is also noted that TEX. R. CIV. PROC. 215 is similar to Federal Rule of Civil Procedure 37, which also authorizes discovery sanctions.

The Arbitrators note that this sanctions proceeding is one of first impression. The question may arise as to whether federal law on privilege issues applies to the resolution of this proceeding. Thus, the Arbitrators cite applicable federal legal authority in addition to state legal authority on such issues, specifically the attorney-client privilege.

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[23] Order No. 1, Notice of Prehearing Conference, Notice of Hearing, and Establishing Procedures (January 8, 1999).

[24] Subchapter H, Discovery Procedures, P.U.C. PROC. R. 22.141, 22.142, 22.143, 22.144, 22.145, and Subchapter I., Sanctions, P.U.C. PROC. R. 22.161.

[25] *Bodnow v. City of Hondo,* 721 S.W.2d 839, 840 (Tex. 1986).

II. RULINGS ON MOTIONS

A. MOTIONS TO DECLASSIFY ACI EXHIBIT 153

Factual Summary

Petitioners made oral motions during the hearing on sanctions for declassification of ACI Exhibit 153 and a number of other documents.[26] The Arbitrators requested that parties negotiate to resolve which documents could be declassified, but no consensus was reached. Petitioners then filed motions to declassify,[27] which were limited in scope to only documents in evidence by Order No. 18.[28] SWBT responds that it has properly designated these documents as "confidential information" under the Protective Order. In support, SWBT filed affidavits for a number of documents in evidence that it has designated as "confidential," for *in camera* review.

It is worth noting that the issue of declassification appears at several points within this Order. The Petitioners have filed motions to declassify, and have also claimed that improper designation of documents as confidential is a violation of the Protective Order, and should be considered a sanctionable offense. The Arbitrators will not rule on the motion to declassify the vast majority of documents at this time, but will instead only rule with respect to ACI Exhibit 153. The Arbitrators address whether the alleged improper designation of documents as confidential rises to the level of sanctionable behavior in Section II. D. of this Order.

Conclusion

The Arbitrators have not had the opportunity to complete a page-by-page review of the two boxes of documents at issue. In the interest of filing this Order in a timely fashion, the Arbitrators will reserve ruling on the remaining documents in question until a later date.

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[26] Tr. at 968 (June 3, 1999).

[27] ACI's Second Motion to Declassify (June 25, 1999), Motion of Communications Company to Declassify Documents Improperly Designated Confidential by SWBT (June 25, 1999).

[28] Order No. 18, Addressing Southwestern Bell Telephone Company's Request for Extension of Time and Clarifying Responses to Motions to Declassify (July 2, 1999).

As stated in Order No. 19, the proceedings before this Commission are open and held in the public interest. Primarily for that reason, the presumption is that all documents in this proceeding are public and not entitled to be veiled in secrecy. There is no basis under applicable law or the previous orders in this proceeding to find that ACI Exhibit 153 contains confidential information. The Arbitrators do not find, nor has SWBT asserted, that ACI Exhibit 153 contains trade secret information or confidential business information. The Arbitrators further note that SWBT has not provided any support for designating ACI Exhibit 153 as confidential.[29] In keeping with the rulings in Order No. 8, the Arbitrators do not find that the information contained in ACI Exhibit 153 is competitively sensitive information. Furthermore, the Arbitrators uphold their ruling that ACI Exhibit 153 is not a privileged communication. At this time, all of ACI Exhibit 153 is declassified. However, this ruling is stayed, pending a ruling on appeal by the Commissioners on this Order. For the purposes of maintaining the confidentiality of ACI Exhibit 153, all references to the substance of the document are contained in Confidential Attachment C, which has been filed under seal, pending the Commission's final ruling.

B. Motion To Reconsider And Reverse Bench Ruling On The Status Of ACI Exhibit 153

Factual Summary

ACI Exhibit 153 is an e-mail message from Mari Quick, dated January 14, 1999, to a group of SWBT and SBC employees.[30] In their bench ruling issued on June 3, 1999, the Arbitrators heard full argument and ruled on three, separate, independent grounds that the ACI Exhibit 153 was not privileged, or that SWBT had waived the privilege. First, the Arbitrators ruled that the e-mail was not a privileged communication in that SWBT failed to meet its burden of proof to provide a factual basis for the privilege. Second, in the alternative, in the event the e-mail was privileged, the Arbitrators found that SWBT had intentionally waived the privilege when it produced the document. Third, in the alternative, even if the document were privileged,

[29] In its response to Petitioners' motions to declassify, SWBT did not provide an affidavit to support its designation of "Confidential" on ACI Exhibit 153.

[30] *See* Confidential Attachment C, Paragraph 2.

the Arbitrators found that the Petitioners made a *prima facie* showing that the communication met the crime/fraud exception under TEX. R. CIV. EVID. 503(d)(1).[31]

During the hearing on sanctions, SWBT immediately made an oral motion for reconsideration of the Arbitrators' ruling. The Arbitrators denied this motion on the same three grounds. In its written Motion to Reconsider, SWBT again asks that the Arbitrators reverse this bench ruling. At a minimum, SWBT seeks the reversal of the crime/fraud finding. It appears that SWBT may acquiesce to a finding that the document is not subject to the attorney-client privilege (the first ground), or that the privilege on ACI Exhibit 153 was waived on grounds other than the crime/fraud exception.

Analysis

Ground One: The Communication Is Not Subject to the Attorney-Client Privilege

SWBT offered no factual support for its claim of attorney-client privilege with respect to ACI Exhibit 153. To prove the attorney-client privilege, the burden is upon the party asserting the privilege to present evidence necessary to establish the privilege. The evidence may be testimony presented at a hearing or through affidavits. TEX. R. CIV. PROC. 193.4(a). The claimant must establish the following elements: (1) the asserted holder of the privilege is a client; (2) the person to whom the communication was made is an attorney and is acting as such in connection with the communication; (3) the communication relates to a fact of which the attorney was informed by the client without the presence of strangers for the purpose of securing primarily either an opinion on law, legal services, or assistance in some legal proceeding, and not for the purpose of committing a crime or tort; and (4) the privilege has been claimed and not waived by a court. TEX. R. CIV. EVID. 503; *United States v. Robinson*, 121 F.3d 971, 974 (5th Cir., 1997) cert. denied; *United States v. Kelly,* 569 F.2d 928, 938 (5th Cir. 1978) cert denied.

The e-mail message is not a communication between client and attorney. Rather, it is a business communication containing an instruction from one SBC employee to other SBC

[31] Tr. at 948-956 (June 3, 1999).

employees. The issue, therefore, concerns what Ms. Quick communicated to 81 SBC employees in her e-mail message.[32]

The communication in Ms. Quick's e-mail of January 14, 1999 is not privileged because it does not convey legal advice; instead, the communication contains a directive regarding business matters of an administrative nature.[33]

There is no legal context, and no reference to legal rights and obligations, attributed to the statements contained in the e-mail that would demonstrate it contained legal opinions or advice. An author's belief that the communication was an "attorney/client communication" does not necessarily make it so. All communications with lawyers are not *ipso facto* privileged; rather, the privilege applies only when legal advice is sought from a professional legal advisor in his capacity as such. 8 John H. Wigmore, Evidence § 2292 at 554. The record is devoid of any evidence establishing that Ms. Quick sought legal advice or conveyed legal advice. Again, on its face, the communication does not refer to any *legal* reason underlying the directive. It is merely an instruction to do something, asserted without any rationale for doing so.

If conclusory statements were sufficient to establish the attorney-client privilege, almost any such document involving an attorney would be protected from disclosure. *See Interphase Corp. v. Rockwell International Corp. et al.*, 1998 WL 664969 (N.D. Tex. 1998). A material fact cannot be cloaked in secrecy merely by claiming it was communicated by an attorney. *See Huie v. DeShazo,* 922 S.W.2d 920, 923 (Tex. 1996).

In *Upjohn*, the court rejected a mechanistic approach to application of the attorney-client privilege and held that each case must be evaluated to determine whether the application of the privilege would further the underlying purpose of the privilege. *Upjohn Co. et al. v. United States et al.*, 449 U.S. 383, 396, 397; 101 S.Ct. 677 (1981). The purpose of the privilege is to "encourage frank and full communication between attorneys and their clients and thereby promote broader public interests in the observance of law and administration of justice." *Id.* at 389. Unlike instances in which a communication is clearly one between an attorney and client

[32] *See* Confidential Attachment C, Paragraph 3.

[33] *See* Confidential Attachment C, Paragraph 4.

concerning legal issues, Ms. Quick's e-mail message does not have any implied relation to a legal proceeding or legal issue.

Furthermore, the communication is not privileged simply because it was sent to an attorney. *Upjohn at* 395 - 396.[34]

Other than *Interphase,* there are no cases on point in the Fifth Circuit that address the distinction between legal advice and business advice. Other federal courts, however, have addressed this issue. In the Eighth Circuit, the court looked at the subject matter of the communication and the context in which the communication was made in order to limit privileged communications to a particular *legal problem,* while taking into account a corporation's way of doing business (italics added). *See Diversified Industries, Inc. v. Meredith,* 572 F.2d 596 (8th Cir. 1978).

Based on Ms. Quick's testimony, the Arbitrators find that the e-mail message was a matter of routine business. The federal courts addressed routine business communications in *Hercules v. Exxon Corp.,* which held that a communication is not privileged if made in the routine course of business without a request for legal advice.[35]

The court in *Burton v. RJ Reynolds Tobacco Co.,* stressed that the communication must relate to legal advice and be made for the purpose of giving or receiving legal advice. To this end, the court held that evidence must be proffered that the document claimed to be privileged involved the giving or requesting of legal advice.[36] Failure to introduce evidence that the client communicated information in confidence in order to seek legal advice will cause a claim of privilege to fail. *United States v. Abrahams,* 905 F.2d. 1276, 1283 (9th Cir. 1990) overruled on other grounds.

There is no evidence that anyone sought legal advice from Ms. Cavanaugh on the matters contained in the e-mail message. Moreover, there is no evidence that the e-mail message was made for the purpose of conveying an opinion of law, or legal services or assistance in a legal proceeding. The record reflects that Ms. Quick conveyed routine business matters, not legal

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[34] *See* Confidential Attachment C, Paragraph 5.

[35] 434 F. Supp. 136, 145 (D. Del. 1997).

[36] 177 F.R.D. 491, 496 - 497 (D. Kan. 1997).

advice as defined by federal legal authority. In conclusion, SWBT failed to prove the communication was legal advice or that it facilitated the rendition or professional legal services.

Ground Two: Intentional Waiver

The Arbitrators ruled from the bench that SWBT had intentionally waived any attorney-client privilege associated with the e-mail communication when it produced ACI Exhibit 153. There are four reasons why the Arbitrators' ruling on that matter was correct. First, testimony shows that an attorney, in accordance with the Protective Order, reviewed every SWBT document that was designated "confidential information."[37] Second, every privileged document produced was assigned either a Bates stamp number beginning with ACICRECP or ACICP.[38] Third, the production of the e-mail message was not inadvertent – it was not wedged in the middle of another document, for example – but was instead intentionally provided through SWBT's production process. Finally, in anticipation of production, the e-mail message was stamped "confidential" – *not privileged* -- by a SWBT attorney. The document was *not* included in SWBT's log of privileged communications, although SWBT unsuccessfully attempted to add it to the privilege log through an addendum filed on June 9, 1999. In view of the review of the document by SWBT's attorneys, its subsequent designation as a confidential -- and not privileged -- document, and its production as such to other parties, the Arbitrators properly concluded in their bench ruling that SWBT waived any privilege associated with the e-mail message.

The Arbitrators also find authority under federal common law that the production by SWBT waived the privilege, if any exists, under the *Alldread* test. The Fifth Circuit, in *Alldread v. City of Grenada et. al.*, 988 F.2d 1425 (5th Cir. 1993) no writ, adopted a five-part test for determining whether waiver has occurred when a privileged document is claimed to be inadvertently produced. The court held that the circumstances surrounding a claimed inadvertent disclosure should be evaluated on a case-by-case basis to determine if protection is warranted. 988 F.2d at 1434. In determining whether inadvertent disclosure has resulted in a waiver of

[37] Tr. at 1041 (June 3, 1999). Testimony cites that an attorney reviewed every piece of confidential production and the Protective Order required that an attorney review each and every document. *See* Confidential Attachment C, Paragraph 6.

[38] Tr. at 1476 (June 3, 1999).

privilege, the court held that all of the circumstances surrounding the disclosure should be evaluated, taking into consideration (1) the reasonableness of the precautions taken to prevent disclosure; (2) the amount of time taken to remedy the error; (3) the scope of discovery; (4) the extent of disclosure; and (5) the overriding issue of fairness. 988 F.2d at 1434; *see also, Parkway Gallery Furniture, Inc. v. Kittinger/Pennsylvania House Group, Inc.*, 116 F.R.D. 46, 50 (M.D.N.C. 1987) no writ.

This test balances the purpose of the attorney-client privilege – protecting communications which the client intended to be confidential – but yet does not reward "those claiming the privilege of the consequences of their carelessness if the circumstances surrounding the disclosure do not clearly demonstrate that continued protection is warranted." *Alldread* at 1434. *Alldread* predates the adoption of TEX. R. CIV. PROC. 193.3,[39] which was adopted to reflect current federal common law and to overturn *Granada Corp. v. 1st Ct. of Appeals*, 844 S.W.2d 223, 227 (Tex. 1992), which was overruled on other grounds. Absent any express test under TEX. R. CIV. PROC. 193.3 as to its analysis and application, the Arbitrators find the Fifth Circuit test controlling.

When a document has been voluntarily disclosed but inadvertent disclosure is claimed, the proponent of attorney-client privilege has the burden of first proving that the disclosure was inadvertent, and then persuading the court that the privilege has not been waived. *Parkway Gallery* at 50; *See Hartford Fire Ins. Co. v. Garvey*, 109 F.R.D. 323 (N.D.Cal. 1985). The record reflects that SWBT established that it took reasonable steps to protect numerous documents upon which it claimed privilege, as evidenced in its voluminous privilege log.[40] Further, SWBT requested the return of ACI Exhibit 153 – the only document claimed as inadvertently disclosed – after it was proffered. However, these are the only factors conceivably in SWBT's favor. In fact, the elaborate document production procedure can equally support the

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[39] TEX. R. CIV. PROC. 193.3(d) states that a party who produces material or information without intending to waive a claim of privilege does not waive that claim under these rules or the Rules of Evidence if-- within ten days or a shorter time ordered by the court, after the producing party actually discovers that such production was made-- the producing party amends the response, identifying the material or information produced and stating the privilege asserted. If the producing party thus amends the response to assert a privilege, the requesting party must promptly return the specified material or information and any copies pending any ruling by the court denying the privilege.

[40] *See* Confidential Attachment C, Paragraph 6.

conclusion that the attorney-client privilege was voluntarily waived. The scope of discoverable material was limited to such an extent in this particular instance that SWBT could reasonably have discovered any privileged materials and designated them as such. The Arbitrators had instructed SWBT on more than one occasion that it could request that the scope of discovery be narrowed. The record reflects that SWBT did not request an extension for discovery. In addition, full disclosure occurred when Petitioners became fully aware of the contents of the directive. Once disclosure is complete, an order "cannot restore confidentiality and, at best, can only attempt to restrain further erosion . . . only in special cases should [an order] attempt to resurrect the secret by. . . limiting further disclosure." *Parkway Gallery* at 52. SWBT's disclosure in this instance is not a special case; in the interest of fairness, the substance of ACI Exhibit 153 relates to matters central to the discovery disputes in this proceeding, which are the core of this sanctions proceeding. For all these reasons, the Arbitrators find that production of the e-mail document was intentional, and, therefore, SWBT waived any privilege associated with the communication upon its production.

Ground Three: The Crime/Fraud Exception

In the alternative, the Arbitrators ruled that the e-mail message is not privileged because it falls within the crime/fraud exception to the attorney-client privilege. TEX. R. CIV. PROC. 503(d)(1). This exception applies only if the party seeking the information makes a *prima facie* case of contemplated fraud, the document is related to the *prima facie* proof, and the *prima facie* case is not rebutted in the record. *Granada* at 227. A *prima facie* showing is made by setting forth evidence that, if believed by the jury would establish that the client was about to commit or was engaging in ongoing fraud. *Volcanic Gardens Management Co., Inc., v. Paxson*, 847 S.W.2d 343, 347 (Tex.App.—El Paso 1993) no writ. However, mere allegations of such will not suffice and there must be a relationship between the communication to the alleged crime or fraud. *In re International Systems & Controls Corp.*, 693 F.2d 1235, 1243 (5th Cir. 1982).

SWBT argues that the Supreme Court in *United States v. Zolin* required an extrinsic showing of *prima facie* evidence before the Arbitrators could even consider what ACI Exhibit

153 said on its face.[41] SWBT's reliance on *Zolin* is misplaced. The Court in *Zolin* held just the opposite: the exception does not always have to be established by independent evidence. 491 U.S. at 556. Indeed, the facts here are remarkably similar to the facts in *Zolin.* As in *Zolin,* the e-mail message in ACI Exhibit 153 is the sole evidence establishing the alleged crime or fraud. To prohibit Petitioners from making their *prima facie* case using this document would lead to an absurd result. Further, under *Zolin*, once the Arbitrators looked at the e-mail message to determine if it was privileged, they were then also permitted to ascertain if the exception applied. *Id.* at 568.

Ms. Quick's e-mail communication was dated January 14, 1999, well after this litigation had begun, and after the first set of RFIs had been propounded to SWBT. SWBT did not offer any rebuttal evidence.[42]

The law embraces the open discovery of facts so that fact-finding bodies can ascertain the truth. When a communication shows that a client was about to commit or was engaging in ongoing fraud, the crime fraud exception necessarily applies to negate any assertion of the attorney-client privilege. This exception is well established. Because of the *prima facie* showing for which SWBT did not present rebuttal evidence, the Arbitrators confirm their bench ruling that the crime/fraud exception applies and, therefore, ACI Exhibit 153 is not privileged.

Conclusion

The Arbitrators find that SWBT has not advanced any new arguments justifying reversal. The motion is yet another reiteration of the arguments SWBT made during the hearing on sanctions. There is no new additional evidence from SWBT that rebuts the finding. The Arbitrators overrule the motion, finding again that SWBT did not establish that ACI Exhibit 153 is a privileged document, or, if the document was privileged, that SWBT waived the privilege when it intentionally produced the document, or that the document is not privileged because, on its face, it squarely fits the crime fraud exception under TEX. R. CIV. EVID. 501(d)(1), and there is no evidence in the record that rebuts the *prima facie* showing.

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[41] *United States v. Zolin,* 491 U.S. 554; 109 S.Ct. 2619 (1989).

[42] *See* Confidential Attachment C, Paragraphs 7 and 8.

C. SWBT'S REQUEST FOR USE OF PRIVILEGED DOCUMENTS UNDER TEX. R. CIV. EVID. 107

Factual Summary

When ACI Exhibit 153 was proffered, SWBT argued that the rule of optional completeness (TEX. R. CIV. EVID. 107) allowed SWBT to use a privileged document in an effort to explain the circumstances around what the directive in ACI Exhibit 153 said on its face.[43] SWBT contended the extrinsic, privileged evidence would show additional exculpatory facts not apparent from a plain reading of ACI Exhibit 153.[44] The Petitioners argued that if SWBT intended to use a privileged document, it followed that SWBT must waive the privilege on that document and all similar communications.[45] SWBT, however, wanted the Arbitrators to rule beforehand that SWBT would not be required to waive the privilege on the exculpatory document, or any other related privileged communication. The Arbitrators were concerned that allowing a single document, protected under the cloak of attorney-client privilege, to be reviewed for the sole purpose of providing an exculpatory explanation, but not entered into evidence, would severely prejudice the Petitioners and prevent the Arbitrators from discovering all of the facts surrounding the misconduct indicated on the face of ACI Exhibit 153.

In fact, TEX. R. CIV. EVID. 107 cuts against SWBT's arguments by providing that the entire context of the document, rather than selective portions, should be reviewed. The Arbitrators refused SWBT's request at the time, but because of the seriousness of the allegations, the Arbitrators requested briefs on the issue of the scope of waiver and whether TEX. R. CIV. EVID. 107 extended to the use of privileged documents. Briefs were submitted and the parties reiterated their positions.

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[43] TEX. R. CIV. EVID. 107 states "When a part of an act, declaration, conversation, writing or recorded statement is given in evidence by one party, the whole on the same subject may be inquired into by the other, and any other act, declaration, writing or recorded statement which is necessary to make it fully understood or to explain the same may also be given in evidence, as when a letter is read, all letters on the same subject between the parties may be given. "Writing or recorded statement" includes depositions."

[44] Tr. at 885 – 888 (June 3, 1999).

[45] Tr. at 893 – 898 (June 3, 1999).

SWBT proffered the affidavit of Merrie Cavanaugh in support of SWBT's contention that ACI Exhibit 153 was privileged.[46] The Cavanaugh affidavit, however, went beyond an attempt to prove privilege.[47] In effect, SWBT was circumventing the Arbitrators' ruling against allowing extrinsic evidence, that SWBT claimed was privileged, to be used in the hearing. Upon inquiry by the Arbitrators, SWBT said that it would assert the attorney-client privilege on any of the communications discussed in the affidavit. Further, SWBT indicated that it would instruct Ms. Cavanaugh not to answer questions on her statements concerning her communications, should she be asked to testify.[48]

Analysis

Allowing evidence into the record while SWBT is claiming a privilege exists on the evidence, would be a violation of TEX. R. CIV. PROC. 193.4(c), which states "A party may not use -- at any hearing or trial -- material or information withheld from discovery under a claim of privilege, including a claim sustained by the court, without timely amending or supplementing the party's responses to that discovery." The plain language of TEX. R. CIV. PROC. 193.4(c) clearly anticipates that SWBT's request to use allegedly privileged information to exculpate, or explain the facts surrounding ACI Exhibit 153, without divulging the information to Petitioners, is not allowed. SWBT's attempt to develop the factual record surrounding ACI Exhibit 153 with selective information that it claims is privileged, without allowing the examination of closely related evidence that may exist, would mean that the veracity and completeness of SWBT's proposed rebuttal evidence could not be challenged. Moreover, the Arbitrators would not know if there were other communications concerning ACI Exhibit 153, or the type of directive contained in that e-mail, that are *not* exculpatory. Such a proposal contradicts the underlying purpose of TEX. R. CIV. EVID. 107.

Thus, the Arbitrators conditionally admitted the Cavanaugh affidavit, ruling that the statements regarding any communications other than ACI Exhibit 153, which SWBT claimed to be privileged, be stricken and fully redacted by SWBT. SWBT subsequently made its offer of

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[46] *See* Confidential Attachment C, Paragraph 9.

[47] The affidavit was marked as SWBT Exhibit 43.

[48] Tr. at 277-280 (June 23, 1999).

proof and resubmitted the affidavit on July 1, 1999, with the stricken portions only lined-through. SWBT declined to fully redact the affidavit as ordered, claiming Ms. Cavanaugh could swear to the lined-out affidavit, but not to the fully-redacted form the Arbitrators ordered. Order No. 19 was then issued, requiring SWBT to comply with the redaction ruling if it wanted the affidavit admitted. SWBT declined to follow the ruling, and the affidavit was not admitted. In light of SWBT's position on intending to use allegedly privileged information without waiving same, Ms. Cavanaugh was not asked to testify by the Arbitrators.

Conclusion

For the reasons stated, the Arbitrators deny SWBT's request to use an allegedly privileged document in an effort to provide further explanation of ACI Exhibit 153. The Arbitrators that such document cannot be used without allowing the whole or the same subject to be inquired into, or any other evidence which is necessary to make ACI Exhibit 153 fully understood, or to explain it to be admitted into evidence.

D. Petitioners' Motions for Sanctions

ACI and Covad Allegations; SWBT Defense

In ACI's original motion for sanctions and its amended motion for sanctions, ACI alleges four separate grounds for sanctions. First, ACI claims SWBT's response was either non-responsive or its response was incomplete to specific RFIs. Second, ACI alleges SWBT intentionally materially revised ACI Exhibit 17, which was supposed to be a redacted version of ACI Exhibit 17a. Third, ACI argues that SWBT abused the "Confidential" designation by improperly designating numerous documents as confidential without any foundation for doing so. Finally, ACI claims that ACI Exhibit 153 instructed SWBT employees to intentionally take the actions described in Confidential Attachment C, Paragraph 10. In addition to the same four grounds for sanctions alleged by ACI, Covad alleges that SWBT intentionally misdesignated its experts in an effort to "plausibly deny" any knowledge of specific xDSL wholesale and retail implementation details.